IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, Trustees of the Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ADDRESSING ARGUMENTS RAISED IN BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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1. The Ninth Circuit Court of Appeals and the opposition brief filed by the government base their conclusions on the erroneous assumption that simply because a water body is deemed "navigable" for purposes of regulation it is automatically subject to the federal public navigation servitude as well.

Neither the Ninth Circuit opinion nor the opposition brief, however, are able to cite any direct authority for that assumption. A contrary conclusion was reached in 30 OP. ATT'Y. GEN. 203, 213-14 (1930), which opines that a wholly artificial body of water, even though subject to regulation, would not automatically be subject to a public navigation servitude. It logically follows that a natural body of water such as Kuapa Pond, which was clearly

nonnavigable and private in its natural condition and improved for navigation only by extraordinary private artificial means (Pet. App. 23a-24a, 31a-32a), would likewise not be subject to the servitude. *See also Vermilion Corporation* v. *Vaughn,* 356 So.2d 551 (La. App. 1978), *writ denied,* 357 So.2d 558 (La. 1978), *petition for cert. pending,* No. 77-1819. The District Court, the tribunal most familiar with the present problem, correctly held that no inconsistency results in the circumstances of this case from separating federal regulatory authority under the Rivers and Harbors Act from the power to impose a public navigation servitude (Pet. App. 31a-33a).

This Court has never addressed the issue presented by the Petition. It has never held that all waters navigable in fact are *a fortiori* open to public use. Congress passed the Rivers and Harbors Act to regulate for public safety and to protect commerce, not to afford public access to private waters at private expense.

The Brief of the United States in Opposition states: "[A]ll the United States has done by virtue of the court of appeals decision here is to prevent obstruction of public navigation." (Opp. Brief, 9.) That is precisely Petitioners' point—without foundation in law the government seeks to appropriate private property for public use under the guise of its regulatory authority. This use of regulatory authority has not been sanctioned by this Court, by the Constitution, or by Congress.

2. The Ninth Circuit Court of Appeals and the government persist in misapprehending Petitioners' reliance on *federal* rather than state recognition of private vested rights to Hawaiian fish ponds.

Petitioners have consistently maintained that *federal* recognition of pre-existing vested rights to fish ponds occurred upon annexation. Act of July 7, 1898, 30 Stat. 750-51. Federal recognition was affirmed by Congress when it passed the Organic Act, Section 95, codified at 48 U.S.C. § 506. Petitioners have never asserted or implied that state law takes precedence over federal authority, but do assert that federal recognition of private rights overrides the government's attempt to enforce an erroneous interpretation of its regulatory authority. This Court has itself recognized that grants of private rights by pre-existing sovereigns survive annexation by the United States and control over inconsistent state or federal law. *Knight* v. *United States Land Ass'n.,* 142 U.S. 161, 183-84 (1891); *San Francisco* v. *Le Roy,* 138 U.S. 656, 671-72 (1890). These cases are ignored by the Ninth Circuit opinion and the opposition brief.

The traditional private rights in fishponds, such as Kuapa Pond, remain today as *federally* recognized rights of property, which must be judicially protected. *Damon* v. *Hawaii,* 194 U.S. 154, 158 (1904).

Recent development work notwithstanding, Kuapa Pond remains in law a private water body; its essential feature of separation by barrier beach formation from the open sea persists. Nothing in the record or the law suggests that its historical, federally-recognized private status has ever been surrendered or abandoned. The government itself concedes the existence of exclusive private fishing rights.

The assertion of the government and Court of Appeals that, even under Hawaiian law, exclusive rights are recognized only so long as a fish pond continues to be used for traditional fish cultivation is without foundation. They erroneously cite *In re Kamakana,* 58 Haw. 632 (1978), as

"apparently" holding exclusive rights to exist only so long as a fish pond is actively farmed. The private right upheld in that case is *not* conditioned upon continued traditional use of the fish pond in question. They further dismiss the 1957 Opinion of the Hawaii Attorney General, No. 57-159 (1957). This opinion found that fish ponds are private, but may be subject to trespass by boats in emergency, and plainly contemplated their being altered, because in their natural state such trespass would not have been possible. *In re Fukunaga,* 16 Haw. 306 (1904), cited as authority for the proposition that Congress intended to destroy private rights to fisheries in the Organic Act, actually contains strong language to the contrary, emphatically affirming that rights vested upon annexation remain vested until destroyed by condemnation and payment for value. *Id.* at 308-09. This assertion was also expressly rejected by the District Court, which by virtue of its intimate acquaintance with the applicable legal principles was far better qualified than the Court of Appeals and the government to determine the issue. (Pet. App. 16a-17a, 25a-28a).

3. The government absurdly concludes that the problem will not recur, because the government will condition all permit granting from this date forward on the applicant's acceptance of the imposition of a public servitude. If a permit is required by the circumstances, nothing in their regulatory authority gives the Corps of Engineers authority to condition permit granting on the forfeiture of private rights.

The interrelationship between the regulatory authority of the Corps of Engineers and a public navigation servitude has never been decided, and the issue is likely to persist and be raised each time the government conditions permit granting on acceptance of a public servitude.

Further, there exists at least 142 fish ponds in Hawaii in various stages of repair ranging from nearly original condition to substantially modified. In all likelihood, the problem presented here will recur repeatedly until the Supreme Court decides the issue after full analysis.

Moreover, the general question of public access to private navigable in fact waters is by no means indigenous to Hawaii as the pending Petition in No. 77-1819, *Vaughn* v. *Vermilion Corporation,* itself evidences.

CONCLUSION

Unique questions of *federal law* are presented and require Supreme Court resolution to avoid recurring litigation and the trampling of private property rights. If the Ninth Circuit opinion is permitted to stand, the Corps of Engineers, ostensibly vested with regulatory authority only, becomes a vehicle for government taking of private property, circumventing the protections of property owners contained in eminent domain procedures.

Respectfully submitted,

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